‘By Giving to Caesar all things that are Caesar’s’:

History, Filmerian Patriarchalism, and Exclusion Royalism

Accounts of ‘Whig ideology’ have often been directly tied to prior assumptions regarding the specific authors the first Whigs intended to address. For a great deal of time, the polemical target was thought to be Thomas Hobbes (1588-1679) and, as a result, the intention of John Locke (1632-1704) and other early Whigs was formulated accordingly. It was not until Peter Laslett introduced Robert Filmer (1588-1653) to the twentieth-century that scholars began to believe what early Whigs like John Locke and James Tyrell (1642-1718) had *explicitly* told posterity: they were directing their work at Robert Filmer’s *Patriarcha* (1680).[[1]](#footnote-1) Shortly after this, the question became whether Filmer’s patriarchalism was unique to the broader theory of political legitimacy set out by royalists of the Exclusion Crisis. They asked, in other words, whether Filmer could be understood as a representative of Exclusion royalism. The importance of this question began to extend beyond a simple categorization of royalist pamphleteering and became a keystone for understanding the creation and ultimate trajectory of Whig political thought. This is clear in the literature as, now that historians and political theorists group Filmer in with other Exclusion royalists, assumptions about the birth of Whig ideology have, like they did after Laslett’s re-publication of Filmer in 1949, changed.

To be fair, royalists often showed an awareness of Filmer and certainly engaged with the broader symbolism of patriarchalism. There are then fairly good reasons for interpreting these royalists as being heavily influenced by Filmer. But, it remains unclear whether the general theory of political legitimacy posited by Exclusion royalists matched with that put forth by Filmer in the first half of the seventeenth-century. If Filmer does not fit within this broader royalist tradition *in ways these early Whigs would have understood and reacted to*, then it becomes necessary to re-think the broader consensus regarding the conceptual choices made by the early Whig theorists.

In the seventeenth-century England, the past was a powerful but fairly novel tool to use in politics. This means that they were a variety of competing histories existing within the broader political discourse. By examining these histories, one can derive commitments authors had about the individual’s relationship to the state. Filmer’s patriarchal theory of politics was, then, a direct consequence of the Adamite history he employed. By focusing on Adam, Filmer posits a static and unchangeable model for political legitimacy that requires the monarch to hold a radical and arbitrary form of sovereignty. There was, then, no recourse for subjects to resist their government. As Filmer puts it, subjects must act within the confines of an active or passive obedience “by giving to Caesar the things that are Caesar’s...”[[2]](#footnote-2) Exclusion royalists that wrote duringthe Exclusion Crisis, caught in the midst of the Brady Controversy, advanced a theory of either feudal or common law whereby, although the power of the monarch remained arbitrary in *origin*, it was limited in *function*. They strategically advanced a separate and wholly distinct conception of history that emphasized the fluidity of political legitimacy in order to place what they perceived to be important limitations on the monarch. By paying tribute to the originally limitless and arbitrary power of the monarch, these common law royalists were able to place effective limits on monarchical power that would have been roundly rejected by Filmer.

II

Robert Filmer was certainly not the first to employ the language of patriarchalism. It had been used for centuries prior, often appearing as genetic accounts of political society. That is, as a historical as well as naturalistic account of “the development and transformation of the primitive familial association into a wider and more perfected society.”[[3]](#footnote-3) The genetic account employed by Filmer in *Patriarcha* was, however, grounded in a literal interpretation of the Bible and so was different than those that came before him. Near the beginning of *Patriarcha*, Filmer writes,

For as Adam was lord of his children, so his children under him had a command and power over their own children, but still with subordination to the first parent, who is lord paramount over his children’s children to all generations, as being the grandfather of his people…I see not then how the children of Adam, or of any man else, can be free from subjection to their parents. And this subjection of children is the only fountain of all regal authority, by the ordination of God himself.[[4]](#footnote-4)

This Biblical interpretation reflected the recent conceptual shifts that were the result of the Reformation. The relationship between the family and the state had changed and it now located the father, rather than the priest, as the bastion of authority. This change made it possible to understand patriarchal power as a source of *political* power.[[5]](#footnote-5) This change was coupled with the increasing use of history as a means of understanding or evaluating political authority. Gordon Schochet, echoing J.G.A. Pocock, points to the Ancient Constitution and the nascent use of history in the early Stuart period as a historiographical trend that “helped to make inquiring into the past and into political origins an acceptable mode of dealing with normative political problems.”[[6]](#footnote-6) Thus, in Filmer’s hands, this genetic but Biblical view of history was transformed into a theory of political legitimacy.

Filmer’s goal in *Patriarcha* as well as most of his other works is to show how the *origins* of political society provide guidance for political life. This is quite clear in the first chapter of *Patriarcha* where Filmer writes, “I am not to question or quarrel at the rights or liberties of this or any other nation. My task is chiefly to enquire from whom these first came, not to dispute what or how many there are, but whether they are derived from the law of natural liberty or from the grace and bounty of princes.[[7]](#footnote-7) This focus on historical origins leads directly to a defense of a particular conception of sovereignty: “[a] proof unanswerable for the superiority of princes above laws is…that there were kings long before there were any laws.”[[8]](#footnote-8) Filmer conceives of sovereign power a matter of definition derived from a particular conception of history. He is not making a theoretical but an empirical and historical claim when he writes, “[t]here never was nor even can be any people governed without a power of making laws, and every power of making laws must be arbitrary. For making a law according to law, is *contradictio in adjecto*.”[[9]](#footnote-9) There then cannot be, again, *by definition*, a sovereign law-making power that is not arbitrary in nature and held in a single person.

This argumentative strategy is where one can see a fundamental justificatory difference between patriarchalists like Filmer and other absolutist theorists writing alongside him. In *Leviathan*, Hobbes does not argue for absolute sovereignty on definitional grounds, but rather on account of its ability to alleviate fear of violent death and promote circumstances for commodious living.[[10]](#footnote-10) To put it crudely, Hobbes is arguing from utility. He identifies two passions that incline men to peace and argues that absolute monarchy is the best way to satisfy these passions. What Filmer does in *Patriarcha* is quite different. A good example of this difference is the way in which Filmer rejects “a state mixed of popular and regal power.”[[11]](#footnote-11) He derides the “vanity of this fancy” and argues that it is “a mere impossibility or contradiction. For if a king but once admit to the people to be his companions, he leaves to be a king, and the state becomes a democracy.”[[12]](#footnote-12) Here, Filmer wants his reader to know that a mixed monarchy is not simply an inadequate way to govern and so might lead to disorder, but, rather, that such a monarchy is not a monarchy at all.

It is Filmer’s commitment to showing the *origins* of sovereign power that leads him to argue in terms of definition. If kings existed before laws, then logic dictates that sovereign power can only be radically arbitrary and limitless power held by a monarch. Filmer recognized his points of departure from Hobbes. In *Observations Concerning the Originall of Government* (1652) he writes,

I consent with [Hobbes] about the rights of exercising government, but I cannot agree to his means of acquiring it. It may seem strange I should praise his building and yet mislike the foundation, but so it is…A few shorts notes about them here I offer, wishing he would consider whether his building would not stand firmer upon the principles of *regnum patrimoniale*…If, according to the order of nature, he had handled paternal government before that by institution, there would have been little liberty left in the subjects of the family to consent to institution of government.[[13]](#footnote-13)

Filmer continues to attacks Hobbes for his view of history, arguing that, “Scripture teacheth us otherwise, that all men came by succession and generation from one man. We must not deny the truth of the history of the creation.”[[14]](#footnote-14) Although Filmer’s real problem with Hobbes ends up having to do Hobbes’ broader claims to natural equality and government based by consent, notice that Filmer does not directly attack those claims. Instead, he attacks Hobbes’ view of history.

Filmer often focused on his interlocutor’s conception of history. In *Patriarcha*, Filmer begins the text by rejecting what he perceives to be Cardinal Bellarmine’s view of history in *De Laicis*. Bellarmine, writing at the turn of the seventeenth-century argued that “secular or civil power is instituted by men. It is in the people unless they bestow it in on prince.”[[15]](#footnote-15) It is quite vague whether the exact quotation Filmer uses is an historical or normative argument. Nevertheless, Filmer makes sure to interpret him *as* making a historical argument and rejects Bellarmine’s conclusions with specific reference to a separate conception of history. In fact, he takes this opportunity to dedicate the entire first chapter of *Patriarcha* to a history of Adamite kingship that spans from Adam, through the Flood and the scattering of nations after Babel, all the way to James I. The Greeks were not immune from this kind of historical critique either. When writing of Aristotle and other “heathen authors,” Filmer argues that Aristotle’s *Politics* was the result of an ignorance “of the manner of the creation of the world.”[[16]](#footnote-16) It was therefore the paucity of their historical knowledge that led to the ancients to their mistaken conclusions about the nature of political life.

On this reading Filmerian patriarchalism is, then, a view of history that *necessitates* a very unique conception of arbitrary sovereignty. There is then no natural law nor any legal custom such as the common law that can limit the actions of the sovereign. This precludes even passive resistance, a mode of political resistance championed by earlier philosophers like Jean Bodin (1530-1596). Bodin’s conception of sovereignty was, however, an enormous influence on Filmer and acts as a useful foil by which to compare Filmer’s thoughts on the concept. Published in 1576, Bodin’s *Les six livres de la république* contains the standard explication of the indivisibility of the sovereign. For Bodin, sovereignty is importantly indivisible. While drawing from some of it, Filmer fundamentally alters Bodin’s conception of sovereignty and, by doing so, joined the then-ongoing European debate over political legitimacy between legal-voluntarism and the natural law tradition.

Bodin was, quite clearly, a natural law theorist. Although sovereign power was indivisible and only held in the hands of the monarch, this sovereign power was limited by natural law and, at times, customary law. So, Bodin does argue that, “[w]e thus see that the main point of sovereign majesty and absolute power consists of giving the law to subjects in general without their consent.”[[17]](#footnote-17) However, he also maintains that, “even if contracts derive only from civil law, the prince is so strictly obligated by agreements that he makes with his subjects that he cannot impair them even by [invoking] his absolute power, as almost all the doctors of jurisprudence have agreed.”[[18]](#footnote-18) Although heavily influenced by many passages in Bodin, all Filmer really takes from Bodin is the basic claim that sovereign power is indivisible. In the English context this meant that the monarch did not share power with Parliament. Parliament, rather, existed at the pleasure of the king.

In *The Originall of Government*, Filmer vehemently rejects any theory of government based on the natural law. Specifically referring to Hugo Grotius (1583-1645), Filmer argues the distinction between the law of nature and the law of nations is wholly useless. This is because there is only one law, that is the law determined by the monarch:

If we will allow Adam to have been lord of the world and of his children, there will need no such distinctions of the law of nature and of nations. For the truth will be that whatsoever the heathens comprehended under these two laws, is comprised in the moral law.[[19]](#footnote-19)

Filmer’s detest for natural law arguments is also apparent in his critique of Francisco Suarez (1548-1617). Filmer often identified natural law arguments with defenses of democratic government, a political system he viewed as dangerous. He writes,

was a general meeting of a whole kingdom ever known for the election of a prince? Was there any example of it ever found in the whole world? To conceit such a thing is to imagine little less than an impossibility, and so by consequence no one form of government or king was ever established according to this supposed natural law.[[20]](#footnote-20)

There is only one passage in *Patriarcha* where Filmer mentions natural law not in the context of another author’s argument. Here, he maintains,

[t]he father of a family governs by no other law than by his own will, not by the laws or wills of his sons or servants. There is no nation that slows children any action or remedy for being unjustly governed; and yes for all this every father is bound by the law of nature to do his best for the preservation of his family. But much more is a king always tied by the same law of nature to keep this general ground, that the safety of his kingdom be his chief law.

However, immediately after this passage Filmer argues,

the force of laws must not be so great as natural equity itself – which cannot fully be comprised in any laws, but is to be left to the religious arbitrament of those who know how to manage the affairs of state, and wisely balance the particular profit with the counterpoise of the public, according to the infinite variety of times, places, and persons.[[21]](#footnote-21)

He immediately weakens his claim about natural law limitations on monarchical power. He alludes to the origins of government and claims that, in general, the force of law cannot be reduced to law, but can only be expressed in the will of the monarch.

Scholars, however, often argue that Filmer is a natural law thinker.[[22]](#footnote-22) Richard Ashcraft is especially insistent on this point. He claims that *Patriarcha*, “acted as a catalyst in forcing the ideological battle [of the Exclusion Crisis] onto the terrain of natural law.”[[23]](#footnote-23) He even goes so far to say that “[Filmer] stressed at some length the natural law basis of this argument.” This is an odd and, as far as I can tell, completely unfounded interpretation. Ashcraft cites no specific passages of Filmer appealing to natural law and mostly offers quotations from other royalists that make the connection. One needs only look at the infrequency with which he employed the term natural law and the contexts in which the term was used to understand that Filmer was opposed to the idea. Mitigating the power of natural law is noticeable in the seventeenth-century. Monarchical political theory at this time was wholly influenced by Bodin and thus explicit and unbending in how the monarch was limited. This was mainly because it ensured against political resistance: if subjects were sure the monarch could not transgress natural law, there was no need to resist the monarch.[[24]](#footnote-24) Filmer, an author who was intimately familiar with Bodin, would understand the reasons for limitations on monarchical power. Yet, Filmer chose to either address natural law briefly or actively write against it. He focused much more of his energies on attacking the possibility of limitation and, as a result, posited a theory of radical arbitrary sovereignty.

For Filmer, history shows that the only way to run government well as well as safe-guard order and public safety is through a patriotic monarch – a *pater patriae* – or father of the fatherland. This is because the patriotic monarch would never act against its subject’s interests as “all kings, even tyrants and conquerors, bound to preserve the lands, goods, liberties and lives of all their subjects, not by the law of the land, but by the natural law of a father…”[[25]](#footnote-25) Filmer was then fighting back against a Puritan and republican conception of patriotism with a notion of *pater patriae*, a benevolent monarch that existed above all laws and was unlimited in the same ways a father was not limited in running a household. He consistently maintains that, when it comes to deciding between absolute sovereignty and popular rule, “if we trust experience before speculations philosophical, it cannot be denied but that this one mischief of sedition, which necessarily waits upon all popularity, weights down all the inconveniences

Tyranny of monarchy was then not a great concern for Filmer as he believed history showed us that, for the most part, monarchs always provided for their subjects. It was, rather, the tyranny of the multitude that was the concern. For Filmer, there was no middle-ground. Any concessions away from the radical and arbitrary sovereignty stemming from the original power of Adam was a step towards chaos. The simple historical fact that kings existed before law necessitated a static account of political legitimacy that endowed the monarch with unlimited power. Herein lies the major distinction between Filmer and the Exclusion royalists – Filmer does not think a king can be unjust. Filmer, does, of course speak of tyrants and tyranny. He often does in comparison to popular rule. He gives some examples of what he means by monarchical tyranny, however this tyranny is *never* unjust. That is, it does not transgress some custom, natural law, or dictate of reason.

II

The group of writers who supported Charles II throughout the Exclusion crisis have a single theoretical principle in common that, while binding them together, sets them apart from Filmerian patriarchalism. This is, quite simply, that it is possible for the king to be unjust. A description of the ways in which a monarch can act unjustly is not to be found in *Patriarcha* nor, to any great extent in his other writings. Exclusion royalists, however, were fairly concerned with the possibility of the King committing unjust acts and so actively limited monarchical power. They often did so by explicitly employing particular conceptions of history. However, as I will show, even pamphlets that were not historical still employed ideas of law that were motivated by particular notions of history. These histories were, for the most part, not Adamite in nature. Rather, they were grounded in one of two sides of the Brady Controversy.[[26]](#footnote-26) That is, some Exclusion royalists employed ideas of the Ancient Constitution in order to defend a theory of monarchical supremacy grounded in custom and common-law. Others explicitly emphasized the ambiguity of common-law histories and embraced an interpretation of the Norman Conquest in 1096 as a legitimate conquest. Each side of this controversy would deploy a particular conception of history to defend their political positions. What remained common, however, is a historical conception of law as fluid and changeable. This allowed them to claim that, while the monarchy was originally unhindered by legal limitations, the law has progressively changed in ways that there exist clear limitations on monarchical power that, when transgressed, become unjust abuses of monarchical power.

This became immediately apparent in the first few months of the Exclusion Crisis. Approximately eight months after the Charles II prorogued the First Exclusion Parliament in March 1679, Roger L’Estrange (1616-1704) wrote *The Free-born Subject*. L’Estrange had recently been put in charge of pamphlet licensing by Charles II and was the strategic head of royalist political discourse. His writing is thus important to consider if we are to understand the broader idea of political legitimacy held by these royalists. Broadly, the pamphlet tries to draw attention to those who write “in favour of the Free-born, without any regard at all to the Subject.”[[27]](#footnote-27) He first insists freedom will often be outweighed by obligations to the King and that this is not given enough attention by Whig pamphleteers. However, in the first two pages of the pamphlet he is also already insisting on legal limitations on monarchical power.L’Estrange claims, “[a]s we have our *Legal Rights*, so we lie under *Legal Restrictions* too: And the King likewise hath his *Legal Prerogatives*, which are also accompanied with certain *Legal Limitations*.”[[28]](#footnote-28) These legal limitations are grounded in the laws of England, which he refers to as “the *Known*, and *Common Standard* of our *Civil Actions*.”[[29]](#footnote-29)

Of course, L’Estrange, a man who has advanced in life because of Charles II, pays homage to the sovereignty of the monarch:

there can be *no Government at all*, without the Establishment of a *Final Result*, for otherwise the *King* shall *Judge* the *People* and the *People Rejudge* the *King*; and so the Controversie shall run round World without end. Take notice now that *all Appeals* move from a *Lower Court*, or *Sentence*, to a *Superior*; and consider then, how ridiculous it were to *Appeal Downward*; or from *Sovereign Princes*, to any other Power, than to the *King of Kings*, who alone is above them.[[30]](#footnote-30)

Yet, L’Estrange want to also ask his reader to consider the question: “[b]ut let us put the Case now, that a Prince mis-governs: *How shall he be tried?*”[[31]](#footnote-31) He does not immediately answer this arguing that, *prima facie* it seems as if trying a monarch according to the law or without the law seem to be impossible due to the fact that the King is the final judge in all matters. However, after drawing a quick distinction between the monarch’s right to dominion and right to propriety, he argues, “[i]n the *Former*…there lies *no Action* of *Law:* In the other there may, for otherwise he might take away any mans *Free-hold* at pleasure.”[[32]](#footnote-32) Therefore, to protect those who own property in England, there *must* be legal recourse to hold the king accountable, otherwise the king’s power would be limitless.

These limitations on the monarch depend on a definition of tyranny as “[*a*]*n Unjust Domination; or an Abuse of a Lawful Power, to the injury of the People*: as if a Prince should turn a *Legal Government* into an *Arbitrary*.”[[33]](#footnote-33) Government, then, should be grounded in law, not arbitrary rule. Those kinds of actions that are arbitrary are abuses of law and it is, for L’Estrange, very possible for a monarch to oppress their subjects. And, while there is no direct recourse in the written-law it is the case that, “the *King may be sued, and that consequently he stands answerable to the Law*.”[[34]](#footnote-34)

To not recognize the stark contrast between Filmer’s conception of sovereignty and political legitimacy and the one put forth here by the leading Tory pamphleteer even at this early stage of analysis, is to do a disservice both to the radical intent of Filmer and the careful and conservative nature of Exclusion royalists. L’Estrange quite clearly claims that there are cases whereby the subjects may have a recourse to limit the power of the king, and these cases have to do with property and free-holding. Filmer, on the other hand, writes of property-owners:

the freeholders….do not nor cannot give privilege to the Commons in parliament. They that are under the law cannot protect against it, they have no such privilege themselves as to be free from arrests and actions. For if they had, then it had been no privilege but it would be the common law. And what they have not, they cannot give: *Nemo dat quod non habet* [no one gives what he does not have].[[35]](#footnote-35)

Recall that Filmer claims that there is no other form of power than arbitrary power. He insists that the monarch hold a power unlimited by any law or custom.

Although written two years and three years after the Exclusion Crisis ended in 1682, Edmund Bohun’s (1645-1699) *Defence of Robert Filmer, Against the Mistakes and Misrepresentations of Algernon Sidney, Esq.* (1683) relies on Filmerian language to defend Charles II. The target, Algernon Sidney (1623-1683), had met his demise on December 7th, 1683 partly because of *Discourses Concerning Government* (1680), a treatise he had written condemning Filmer’s *Patriarcha.* Although not published until 1698, the work was found when Sir John Lloyd, Privy Councillor to Charles II, had searched his house after Sidney’s arrest in the summer of 1683. It was then used as a witness against Sidney in his trial and was therefore accessible to writers who might want to object to or adopt its ideas. Bohun took it upon himself to protect Filmer from Sidney stating that “my Chief concern being with the Papers…neither as they were produced to prove Mr. *Sidney* Guilty, but as written against Sir *Robert Filmer*’s Patriarcha, or, the Natural Power of Kings.”[[36]](#footnote-36)

Bohun, however, goes on to, quite ironically, misrepresent Filmer’s arguments. He writes,

so far forth as the General Law of the safety of the Common-weale doth naturally bind him; for in such sort, only Positive Laws may be said to bind the King, not by being Positive, but as they are naturally the Best or Only means for the preservation of the Common-Wealth. By this means are all Kings, even Tyrants and Conquerors, bound to preserve the Lands, Goods, Liberties and Lives of all their Subjects, not by any municipal Laws of the Land, so much as the Natural Law of a Father, which binds them to ratifie the Acts of their Fore-fathers and Predecessors, in things necessary for the Publick Good of their Subjects.[[37]](#footnote-37)

Like L’Estrange and Constable, Bohun recognizes moments where the monarch can be an unjust tyranny and safeguards against such a possibility by pointing to the importance of, in this case, natural law in the binding of monarchical power.

Although it is clear that L’Estrange, Constable, and Bohun are concerned with ensuring there are legal limits to monarchical authority, their accounts are certainly more esoteric in how they limit the power of the King. However, there are other Exclusion royalists were much more open about the need for limits on monarchical power. For instance, the anonymous author of *Three Great Questions Concerning Succession and the Dangers of Popery* (1681) rejects the Exclusion Bill outright but also insists on the need to constrain the King through law. They first write,

[t]o allow then the Parliament so Despotick a Power, is to submit at present and make our selves obnoxious to unaccountable miseries hereafter. What shall hinder a Parliament who at pleasure makes every thing lawful or unlawful, as they are aw’d by a strong hand, or left at liberty by a weak, to do any thing, thought never so extravagant; to sell the Kingdom to the *French* or any rich enough to make the Purchase? I confess, I think it a had Proposition (and that which makes the Government of a single man, though tyrannical, more tolerable than this of so many.[[38]](#footnote-38)

The author is then quite clearly against allowing Parliament the ability to control the succession. And, like most pamphlets from the Exclusion Crisis, the author combined ideas of political legitimacy with concerns about the Popish Plot and the spread of Catholicism. They took seriously the charges laid out by Titus Oates, but did not find the Duke of York to be involved in the plot and assuaged concerns over the possibility of a Catholic king. He argues that there are “no Laws in being that enjoyn the Heir of the Crown of *England* to believe as the Church of *England*, his departure from that to any other Church can be no Argument for his Disinherison.”[[39]](#footnote-39) The author is then firmly in the royalist camp inasmuch as they reject the Bill of Exclusion, defends James II, and limits the power of Parliament to control the King.

However, the author goes on to place stringent legal limits on monarchs. They write,

[n]ow considering that *Laws bind a King* (which to deny is folly and madness) and that there are already enough and more may be added to prevent a *Popish Successor* mischieving *Protestant Subjects*, if there were no Laws to this purpose, yet Prudence and right reason would continue to us the enjoyment of Liberty, Property and Religion…[[40]](#footnote-40)

The author is claiming that, even if James would be the kind of King oppressed Protestants, the law is so fundamental that it will protect the Protestant religion. The sentiment here is that there would, of course, be a problem if the law could not protect us against the action of a king, but thankfully it can, so a Catholic king should be of no concern.

Finally, while excoriating Parliament for their factionalism and private ambition near the end of the pamphlet, he maintains that,

[t]he Kings of England have bound, and may again limit their Power by their own Consent in *Parliament.* But if this Truth be denied, because of that Maxim in our Laws, *The King can do no wrong*; it cannot, That their Ministers and Officers, who must be and are accountable for all, and punishable for Illegal Actions, may be so confin’d as may make our Fears unreasonable of any *Encroachment*s or *Innovations*, let *never so many Popish Princes*, much less *any one* succeed.[[41]](#footnote-41)

Here, it seems that the king is even claiming that Parliament can protect the Protestant religion from the actions of a king. This kind of claim is actually quite stunning considering the author is an English royalist writing in the context of the Exclusion Crisis.

Motivating this approach to political power is a historical notion of political legitimacy, and therefore law, as fluid and changeable over time. Beginning with Sir Edward Coke’s common-law histories in the early seventeenth-century, the argument presented by the common lawyers of the Stuart period was that over centuries England custom and common law had been refined and, as a result, there was no more perfect form of government. Custom had been able to attend to the nuances of the English context over time and therefore “embodies the wisdom of generations, as a result not of philosophical reflexion but of the accumulations and refinements of experience.”[[42]](#footnote-42) Looking at the writing of royalists writing during the Exclusion Crisis, one can either find direct appeals to an idea of the ancient constitution or fundamental law or a skepticism towards such ideas driven by Brady’s feudal history. For instance, although L’Estrange is not particularly concerned with the history of England in *Free-born Subject*, he took aim at the Whig theory of the ancient constitution in the early months of 1680. *The Case Put Concerning the Succession of his Royal Highness the Duke of York* (1679) was a response to the re-publication of Henry Parker’s (1604-1652) 1643 pamphlet *Political Catechism* as well as Charles Blount’s *An Appeal From the Country to the City*, published in the latter months of 1679. The first five pages contain a devastating critique of any argument from history. L’Estrange certainly means to aim this at Whigs like Petyt, and quite clearly does not understand how his critique would also hold against many Tories writing at the same time. In any case, he writes,

[w]as there any *Sedition* that did not recommend, and support it self upon some pretext of *Law* and *President*? Was there ever any *Heresie*, or *Schism*, that did not advance it self under the Countenance of some *Text*…He that has a mind to destroy the *Discipline*, the *Order*, or the very *Doctrine* of the *Church of England*, shall note ye *twenty Texts* for’t: and as many *Presidents*, (if there shall be occasion) for *Diverting*, or *Cutting off*, the *Succession*; nay for *Deposing* the *King Himself*, and *Changing* the very *Form* of the *Government*.[[43]](#footnote-43)

Even though he rejects the ancient constitution, underlying this critique is a remnant of what J.G.A. Pocock calls the common-law mind. Throughout his writing, L’Estrange speaks constantly about the law and how it operates, particularly the ways in which it constrains all who live in political society, including the monarch. This conception of law is, for the most part, historical, fluid, and subject to change. Brady’s feudal history remains in the fore front of his mind. In *The Free-born Subject* L’Estrange writes,

[w]hereas we should as well consider the *Authority* of an *Imperial Prince* one the one hand; as the *Privileges* of a *Free-born People* on the other. And not so far to mistake, either the *Force* or the *Intent* of *MagnaCharta*, and *the Petition of Right*; (by which we claim to these Liberties) as if by being discharged of our *Vassalage*, we were also discharged of our *Allegiance*.[[44]](#footnote-44)

The reference to vassalage is most likely inspired by Brady’s feudal history as well as Petyt’s indignant insistence that English citizens could never have been vassals to the monarch in *The Antient Right of the Commons*. L’Estrange is, then, combatting the Whig ancient constitution according to a new history of feudalism that, while challenging the custom of immemorial law, employs a similarly fluid legal tradition.

Others, like William Assheton (1641-1711) challenged Whigs by using the ancient constitution and citing stringent parliamentary historian Sir Edward Coke. Assheton’s *The Royal Apology* (1684) is a challenge to Whig histories of the ancient constitution that employs ideas of custom and common-law. As it was 1684 and most likely mere months since the execution of Algernon Sidney, Assheton took aim at Sidney’s theory of Parliamentary supremacy. He argues,

[t]hat the King of England hath no Superior but God. That His Majesty did not receive his Authority from any Earthly Power. That he is not Fœdatory, either to the Pope or any other Foreign Prince much less to his own People. That he was not admitted to his Kingdoms with any Limitations.[[45]](#footnote-45)

Yet, in that uniquely English fashion, Assheton also recognizes that monarchs are limited. He argues that, over time, monarchs have conceded power:

For the Kings of *England*, out of their abundant Grace and Favour, and to make their *Government*, more easie and acceptable to their Subjects, have suffere’d themselves to be so limited in their *Exercise* of their Power ; That they can neither make *Laws*, nor raise *Taxes* but in *Parliament*, much less can they pretend to take away the *Life* or dispose of the *Estate* of the meanest of their Subjects but by due course of *Law*. And therefore in this *second* consideration of is Authority *viz*. the *Execution* and *Administration* of it ; *The King of England is not an Absolute but a limited Monarch*.[[46]](#footnote-46)

These limitations are, for Assheton, historical and grounded in a fluid and changing conception of law. Assheton explicitly appeals to what he calls the ‘fundamental law’ to show this: “[w]hoever therefore shall presume to dispute these *Privileges* of the *Crown*, he must not think me uncharitable whilst I tell him, He is an *Enemy* to the fundamental Laws of *England*, and a *Betrayer* of the Rights of the Kingdom.”[[47]](#footnote-47) Assheton’s *Royal Apology* is an example of a Tory employing the ancient constitution to directly challenge Whigs using what was traditionally a tool of those espousing the supremacy of Parliament. It is important to note at this point that Filmer does, in *Patriarcha* as well as *The Free-holder’s Grand Inquest*, seriously inquire into the history of English common-law. However, there is a fundamental difference in how Filmer employs this history. With regards to the English common-law, Filmer writes in *Patriarcha*, “[t]here want not those who believe that the first invention of laws was to bridle and moderate the over-great power of kings. But the truth is, the original of laws was for keeping of the multitude in order.”[[48]](#footnote-48) He continues, admonishing James I as well as those who “affirm that although the laws themselves do not bind kings, yet the oaths of kings at their coronation tie them to keep all laws of their kingdoms” for affirming a view of English common-law that places positive law above the power of the king. For Filmer the lexically prior history is Adamite history. It sets the foundation for the common-law experience of England, which was created only because “king were either busied with wards or distracted with public cares…”[[49]](#footnote-49) The nature of political legitimacy, however, remains unchanged from Adam to Charles I. This is something Filmer makes sure to emphasize when he writes, “custom at first became lawful only by some superior power which did either command or consent unto their beginning. And the first power which we find (as is confessed by all men) is kingly power.”[[50]](#footnote-50) For the Exclusion royalists, neither the common-law nor the feudal law can now be replaced by Charles II. The political obligation they owe the king has changed over time and, while there may have been a time where the monarch had unlimited power, this was no longer the case.

IV

That Filmer has been bunched in with Exclusion royalists is a result of a failure to distinguish the variety of historiographical narratives existing in the political discourse of the Exclusion Crisis. Filmer’s historicism has only been a tangential subject of interest in the literature. His genealogical approach has been described as just one of the many elements of his political thought, and not the foundation of his political thinking.[[51]](#footnote-51) Scholars have gone to great lengths to avoid speaking of Filmer as a historian. For instance, Ward uses the term ‘source-based logic’ to describe Filmer’s Adamite thesis, which, he continues, tends to “collapse the supernatural and the mundane…”[[52]](#footnote-52) Where Ward goes wrong here is that he fails to see the ways in which this source-based logic is not, for Filmer, supernatural. The overall argument is not grounded in a ‘source-based logic,’ but rather a rich and vivid history of political rule that uses the Bible as a historical text. This continues in later sections of the book where he argues that Filmer’s departure from both Bodin as well as Hobbes is because Filmer believes “only a theologically premised argument can be decisive on the question of sovereignty.”[[53]](#footnote-53) My argument is that Filmer emphasis is not on the theological, but the historical. In fact, these two elements of Filmer’s thought are simply not separable. Ward astutely recognizes that Filmer sees Bodin and Hobbes “misunderstand the foundations of political rule” but does not make the additional inference that Filmer is mainly concerned about the ahistorical nature of their political theory.

Pocock does, to his credit, touch on Filmer’s use of history. He even argues, “the whole Filmerian thesis was aimed at dissolving and destroying the concept of immemorial law.”[[54]](#footnote-54) Pocock, however, employs this argument to show how Filmer advanced a separate history Whigs, who posited the immemorial nature of Ancient Constitution. He does not look to the inconsistencies between Filmerian history and the Ancient Constitution employed by Tory writers such as Robert Brady and Roger L’Estrange. By not recognizing this difference, scholars such as Pocock emphasize the lack of historical sense employed by ancient constitutionalists and neglect alternate versions of history put forth by writers such as Filmer. An example of the insistence to interpret Exclusion and post-Exclusion royalists as Filmerian leads to passages such as this: “Johnston’s *Excellence of Monarchical Government* is based in approximately equal parts upon Brady and Filmer, and may be taken as expressing the purely Filmerian interpretation which the royalist intellectual in the 1680’s placed upon the feudal theory of history.”[[55]](#footnote-55) What we see here is a failure to understand that Filmer’s history is the foundation of his politics in such a sense that a ‘purely Filmerian interpretation’ cannot be ‘placed upon the feudal theory of history.’ This makes it immediately un-Filmerian and something else entirely.

The commitment to particular views of history, as I have shown, necessitates theories of monarchical sovereignty and political legitimacy. For Exclusion royalists, a fluid and changing conception of law is employed to show that the arbitrary whim of the monarch cannot be the basis for political society. This concern had much to do with the Church of England and the ensured survival of the Protestant Religion. Ultimately, the difference between these two royalist camps can be reduced to what binds the monarch to their subjects. For Filmerian patriarchalism, what binds the subjects to the monarch and the monarch to its subjects is the concept of fatherhood. This is not a legal relationship, but a familial one. For Exclusion royalists, although the monarch can be understood in patriarchal terms, political life is based on a historical account of custom and common-law.

1. John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge, 1988), p. 74. [↑](#footnote-ref-1)
2. Robert Filmer, ‘Patriarcha: The Naturall Power of Kinges Defended against the Unnatural Liberty of the People’ in *Robert Filmer: Patriarcha and Other Writings*,ed. J.P. Somerville (Cambridge, 1991), p. 4. [↑](#footnote-ref-2)
3. Gordon Schochet, *Patriarchalism in Political Thought: The Authoritarian Family and Political Speculation and Attitudes Especially in Seventeenth-Century England* (Oxford, 1975), p. 11. [↑](#footnote-ref-3)
4. Filmer, ‘Patriarcha’, pp. 6-7. [↑](#footnote-ref-4)
5. Schochet, *Patriarchalism*, p. 58. [↑](#footnote-ref-5)
6. Schochet, *Patriarchalism*, p. 62. [↑](#footnote-ref-6)
7. Filmer, ‘Patriarcha’,p. 4. [↑](#footnote-ref-7)
8. Filmer, ‘Patriarcha’, p. 35. [↑](#footnote-ref-8)
9. Filmer, ‘The Anarchy of a Limited or Mixed Monarchy’ in *Robert Filmer: Patriarcha and Other Writings*,ed. J.P. Somerville (Cambridge, 1991), p. 132. [↑](#footnote-ref-9)
10. Thomas Hobbes, *Leviathan with selected variants from the Latin edition of 1688*, ed. E. Curley (Indianapolis and Cambridge, 1994), p. 78. This is not to say that Hobbes was not concerned with definitions. Anyone who has read *Leviathan* understands that Hobbes’ science of politics is concerned with defining terms. Rather, I am claiming that Hobbes’ theory of absolute sovereignty is not through definition. Rather, it is an argument based in how absolute monarchy can maintain order. [↑](#footnote-ref-10)
11. Filmer, ‘Patriarcha’, p. 31. [↑](#footnote-ref-11)
12. Filmer, ‘Patriarcha’, p. 32. [↑](#footnote-ref-12)
13. Filmer, ‘Observations Concerning the Originall of Government, upon Mr Hobs ‘Leviathan’, Mr Milton against Samasius, H. Gortious ‘De Jure Belli’’, in *Robert Filmer: Patriarcha and Other Writings*,ed. J.P. Somerville (Cambridge, 1991), pp. 184-185. [↑](#footnote-ref-13)
14. Filmer, ‘Observations Concerning the Originall of Government’, pp. 187-188. [↑](#footnote-ref-14)
15. Filmer, *Patriarcha*, p. 5. [↑](#footnote-ref-15)
16. Filmer, ‘Observations upon Aristotles Politiques’ in *Robert Filmer: Patriarcha and Other Writings*,ed. J.P. Somerville (Cambridge, 1991), p. 236. [↑](#footnote-ref-16)
17. Bodin, ‘Book 1 Chapter 8 On Sovereignty’ in *On Sovereignty: Four Chapters from The Six Books of the Commonwealth* ed. Julian H. Franklin (Cambridge, 1992), p. 23. [↑](#footnote-ref-17)
18. Bodin, ‘Book 1 Chapter 8 On Sovereignty’, pp. 35-36. [↑](#footnote-ref-18)
19. Filmer, ‘Observations Concerning the Originall of Government’, p. 210. [↑](#footnote-ref-19)
20. Filmer, ‘Patriarcha’*,* 20. [↑](#footnote-ref-20)
21. Ibid., p. 35. [↑](#footnote-ref-21)
22. Ashcraft, *Revolutionary Politics,* p. 187-189; G.R. Cragg, *From Puritanism to the Age of Reason* (Cambridge, 1950), pp. 170-171. [↑](#footnote-ref-22)
23. Ashcraft, *Revolutionary Politics*, p. 318. [↑](#footnote-ref-23)
24. Ibid., p. 187. [↑](#footnote-ref-24)
25. Ibid., p. 42. [↑](#footnote-ref-25)
26. For a full explanation of the Brady Controversy see: J.G.A. Pocock, *The Ancient Constitution and the Feudal Law*, (Cambridge, 1987), pp. 182-228. [↑](#footnote-ref-26)
27. L’Estrange, *The Free-born Subject,* p. 1. [↑](#footnote-ref-27)
28. Ibid., p. 2. [↑](#footnote-ref-28)
29. Ibid. [↑](#footnote-ref-29)
30. Ibid., p. 3. [↑](#footnote-ref-30)
31. Ibid. [↑](#footnote-ref-31)
32. Ibid., pp. 4-5. [↑](#footnote-ref-32)
33. Ibid., 3. [↑](#footnote-ref-33)
34. Ibid., p. 4. [↑](#footnote-ref-34)
35. Robert Filmer, ‘The Freeholder’s Grand Inquest Touching Our Sovraigne Lord the King and his Parliament’, in *Robert Filmer: Patriarcha and Other Writings*, ed. J.P. Sommerville (Cambridge, 1991), p. 129. [↑](#footnote-ref-35)
36. Edmound Bohun, *A Defence of Sir Robert Filmer, Against the Mistakes and Misrepresentations of Algernon Sidney Esq.*, 3. [↑](#footnote-ref-36)
37. Ibid., 6. [↑](#footnote-ref-37)
38. Anonymous, *Three Great Questions*, p. 13. [↑](#footnote-ref-38)
39. Ibid., p. 14. [↑](#footnote-ref-39)
40. Ibid., p. 21. [↑](#footnote-ref-40)
41. Ibid., p. 25. [↑](#footnote-ref-41)
42. Pocock, *Ancient Constitution*, 35. There, however, lies a contradiction within ancient constitutionalism. Custom and the common law is at once constantly adapting and changing, yet it remains immemorial. Its origins are in the distant and impenetrable past but it has also undergone a great deal of change. [↑](#footnote-ref-42)
43. L’Estrange, *The case put, concerning the succession of His Royal Highness the Duke of York,* p. ,4. [↑](#footnote-ref-43)
44. L’Estrange*, Free-born Subject*, pp. 1-2. [↑](#footnote-ref-44)
45. Assheton, *The Royal Apology*, p. 38. [↑](#footnote-ref-45)
46. Assheton, *The Royal Apology*, pp. 43-44. [↑](#footnote-ref-46)
47. Assheton, *The Royal Apology*, p. 46. [↑](#footnote-ref-47)
48. Filmer, *Patriarcha*, p. 41. [↑](#footnote-ref-48)
49. Filmer, *Patriarcha*, p. 41. [↑](#footnote-ref-49)
50. Ibid., p. 45. [↑](#footnote-ref-50)
51. W.H. Greenleaf, ‘Filmer’s Patriarchal History,’ *The Historical Journal* 9 (2) (1966), p. 157. [↑](#footnote-ref-51)
52. Ward, *The Politics of Liberty*, p. 25. [↑](#footnote-ref-52)
53. Ward, *The Politics of Liberty*, p. 34. [↑](#footnote-ref-53)
54. Pocock, *Ancient Constitution*, p. 188. [↑](#footnote-ref-54)
55. Pocock, *Ancient Constitution*, p. 214. [↑](#footnote-ref-55)